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No. 05-051221

IN THE

Supreme Court of the United States

PRESTON MARTIN, ROY DOUMANI, BEVERLY W. THRALL (Successor to the Claims of Larry B. Thrall), ARBUR, INC., WILLIAM E. SIMON, JR., J. PETER SIMON, AND GEORGE J. GILLESPIE, III (Executors of the Estate of William E. Simon, Sr.),

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether recovery for losses caused by breach of a Government contract, even when the losses are foreseeable as a factual matter, is barred as a legal matter unless the contract itself specifically obliged the harmed party to incur those losses upon breach or the loss is of property the contract obliged the harmed party to acquire.

2. Whether Government resolutions that approve a financial transaction with the Government, address particular persons who made the offer to the Government, and impose obligations on such persons as a condition of approval create a contract enforceable by those persons.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Besides the named petitioners and respondent, two corporations were parties to the proceedings below: Southern California Federal Savings Loan Association ("SoCal") and SoCal Holdings, Inc. ("SCH"), which in 1997 changed their names to People's Bank of California and PBOC Holdings, Inc., respectively. In 2001, the People's Bank of California merged into California National Bank, which became the successor in interest to SoCal. The foregoing institutions, whose rights are not at issue in this petition, have settled their claims in this case.

Of the named petitioners, only one is a corporation, namely, Arbur, Inc. It is a closely held Simon-family corporation with no parent corporations and no publicly held company holding 10% or more of its stock. *See* S. Ct. Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

The parties referred to below as the "Individual Plaintiffs" petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit's opinion (App. 1a-30a) is reported at 422 F.3d 1319. The damages opinion of the Court of Federal Claims (App. 31a-124a) is reported at 57 Fed. Cl. 598. The liability opinion of the Court of Federal Claims (App. 125a-75a) is reported at 52 Fed. Cl. 531.

JURISDICTION

The corrected judgment of the court of appeals was entered on August 30, 2005. App. 1a. A timely petition for panel and en banc rehearing was denied on December 27, 2005. App. 176a-77a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

This case is one of roughly 120 cases that have arisen out of conduct addressed in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), which affirmed breach-of-contract judgments against the United States. Petitioners were investors who successfully rescued a savings and loan (thrift) in 1987, saving the Government, as insurer, from the consequences of the thrift's collapse. They did so under a Government contract that guaranteed permission to count certain capital toward satisfying regulatory requirements. When the Government breached the contract by withdrawing that permission, the thrift had to raise new capital, and part of the price for that capital was the obliteration of petitioners' 1987 equity stake, so that the contributors of the new capital would benefit if the thrift's fortunes turned around, which they did.

This petition seeks review of the Federal Circuit's holding that, although the Government had a contract with petitioners and breached it, petitioners could not recover for the loss of their 1987 equity stake as a matter of law. The Federal Circuit denied petitioners their due by adopting an unprecedented and unjustified narrowing of the fundamental contract-damages principle that an injured party should be placed in the position it would have occupied had the contract been performed rather than breached. The court also strayed from familiar contract law on formation of contracts, ignoring the full scope of petitioners' contract rights. This Court should review the decision in this case, as it reviewed the Federal Circuit's comparable departure from ordinary commercial contract law in *Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, 530 U.S. 604 (2000), in order to enforce and re-establish the bedrock rights of parties to Government contracts, as recognized in this very context by *Winstar*.

A. Background

1. In 1985, an insolvent thrift in California, insured by the Federal Savings and Loan Insurance Corporation (FSLIC), was placed in FSLIC's receivership by FSLIC's governing board, the Federal Home Loan Bank Board (FHLBB, or Bank Board). To avoid liquidating the thrift and incurring the high insurance costs, the FHLBB spent well over a year seeking buyers of the thrift. In late 1986, petitioners (or their predecessors)—a group called the "Individual Plaintiffs" below, which included Preston Martin, former Federal Reserve Vice-Chairman and former FHLBB Chairman, and William E. Simon, Sr., former Secretary of the Treasury—responded with a bid, which the FHLBB approved. App. 4a-5a, 33a-34a, 126a-27a.[1] The deal was one of many "'supervisory

[1] One of the petitioners, Arbur, Inc., is a Simon-family-owned corporation treated as one of the "Individual Plaintiffs." Arbur and Secretary

mergers'" in which "the Bank Board chose to avoid the insurance liability by encouraging healthy thrifts and outside investors to take over ailing institutions." *Winstar*, 518 U.S. at 847 (principal opinion).

The transaction in this case, with its multiple related parts, was consummated in April 1987. On the same day, the FHLBB approved the conversion of the old (mutual) thrift into a common-stock thrift, Southern California Federal Savings and Loan Association (SoCal), and the acquisition of all its stock by a holding company, SoCal Holdings, Inc. (SCH), which petitioners had just formed for the sole purpose of buying SoCal. App. 5a, 127a, 197a, 202a-04a (FHLBB Res. 87-511).[2] As expressed in the FHLBB resolutions and "key" agreement, App. 41a, 133a, petitioners themselves, not only SoCal and SCH, had a bargain with the Government in taking on this role of saving the thrift from liquidation at the Government's expense.

The Government's principal commitment, as far as this case (like other *Winstar* cases) is concerned, was the promise that the thrift could account in a certain way for "regulatory

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Simon's estate are the "Simon Plaintiffs," and Roy Doumani, Preston Martin, and Beverly W. Thrall (successor to her late husband, original investor Larry B. Thrall) are the "DMT Plaintiffs." Together, the two groups constitute the Individual Plaintiffs—as distinguished from the thrift and its holding company, the "Institutional Plaintiffs." *See* App. 2a, 127a. For simplicity, this petition hereafter refers to "petitioners" to include their predecessors (Secretary Simon, in the case of his estate; Larry B. Thrall, in the case of Beverly W. Thrall).

[2] The FHLBB initially called the new thrift "New Association," using "SoCal" for the old thrift. Because the thrift's name remained essentially unchanged, however, throughout this litigation "SoCal" has been used to name the new thrift, and this petition follows suit.

SCH was formed two months earlier—*after* the FHLBB had accepted petitioners' bid in principle—for the sole purpose of acquiring SoCal, as stated in its application to the FHLBB (JX 1381 p. 2) and the main FHLBB approval resolution (App. 197a). App. 130a.

capital," the amount of capital that the thrift is legally required to have in its possession. App. 5a. In this case, the Government's approval resolutions themselves promised to allow the counting of almost $300 million in "capital credits" ($217.5 million) and "supervisory goodwill" ($79 million) as regulatory capital, without which the thrift would have been severely undercapitalized. App. 132a, 133a, 210a, 217a; App. 224a-26a ("Forbearance Letter" to petitioner Martin, chairman and CEO of SCH); *see Winstar*, 518 U.S. at 847-56 (principal opinion). In return, the Government, relying on the personal credentials of petitioners, secured various personal promises from petitioners as part of the bargain, again reflected in the approval resolutions. App. 5a; App. 42a ("The experience and reputation of Secretary Simon's investment group was considered an important intangible asset in the rejuvenation of the thrift.").

The contract between the Government and petitioners had two components that are at issue here. One is a Regulatory Capital Maintenance Agreement (RCMA), App. 178a-96a, which the Government entered into with petitioners, as well as with SoCal and SCH, as signatory parties. App. 5a, 132a; *see* App. 19a ("the Individual Plaintiffs . . . were in contractual privity with the government under the RCMA"). The other is the FHLBB approval resolutions themselves. The RCMA, the FHLBB approval, and SCH's purchase of SoCal all occurred on April 30, 1987. App. 180a ("Stock Purchase Agreement of even date herewith"). The overall transaction thus had several simultaneous, interdependent parts.[3]

[3] The Government also entered into an Assistance Agreement that was signed only by SoCal, SCH, and FSLIC, under which the FHLBB furnished certain financial assistance to the new thrift. *See* App. 5a. This petition does not rely on that agreement.

The RCMA shows the Government's reliance on petitioners personally and the key regulatory-capital guarantee:

- "First, Recital A indicates that 'the [Individual Plaintiffs] collectively own 97.5 percent of the outstanding voting securities of [SCH] and control [SCH].'" App. 19a, quoting App. 180a.
- "Second, Recital G and § 1 include the government's promise that SCH and SoCal will be able to account for $217.5 million in capital credits as part of its regulatory capital." App. 19a. (The separate goodwill guarantee, set out in the main FHLBB approval resolution, was not mentioned in the RCMA.) Section 1 also requires the thrift and its holding company to meet prescribed regulatory-capital levels. *See* App. 5a, 181a-83a.
- "Third, the RCMA states that 'so long as [SCH] shall be obligated pursuant to § 1, the [Individual Plaintiffs], severally in proportion to their initial ownership of the common stock of [SCH] . . ., hereby guarantee the performance of [SCH] and [SoCal] under § 1,'" up to an aggregate limit of $5 million. App. 19a; *see* App. 5a-6a, 41a, 132a, 183a-84a.
- Fourth, "the RCMA requires that the Individual Plaintiffs, or their successors who have assumed their shares of the guarantee and have not been objected to by the FSLIC, shall 'collectively own not less than a majority of the outstanding voting power of [SCH].'" App. 19a-20a; *see* App. 184a-85a. The RCMA also details the remedy for violation of that promise: petitioners forfeit their stock to the Government, which repossesses the thrift and its holding company. *See* App. 186a-89a.
- Finally, the RCMA specifies that the just-described provision for forfeiture and repossession applies also if SoCal's regulatory capital falls below 3% of its Total Liabilities. App. 187a-89a; *see* App. 42a, 132a;